

Decision 04-08-018 August 19, 2004

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of SureWest Communications, a California corporation, and its California public utility subsidiaries, for approval of its reincorporation as SureWest Communications, Inc., a Delaware corporation.

Application 04-05-006  
(Filed May 3, 2004)

**OPINION AUTHORIZING A UTILITY HOLDING COMPANY  
TO REINCORPORATE IN THE STATE OF DELAWARE**

**Summary**

This decision grants authority pursuant to Pub. Util. Code § 854(a)<sup>1</sup> for SureWest Communications, the parent company of SureWest Telephone (formerly known as Roseville Telephone Company), to change its state of incorporation from California to Delaware.

**The Applicants**

There are six co-applicants (collectively, "SureWest"). SureWest Communications (SureWest-California) is a corporation organized under the laws of California as a holding company that owns the other co-applicants.

SureWest Communications, Inc. (SureWest-Delaware) is a corporation organized under the laws of Delaware. It was formed for the sole purpose of assuming the assets and operations of SureWest-California.

SureWest Telephone (formerly known as Roseville Telephone Company) is an incumbent local exchange carrier (LEC) serving portions of Placer and Sacramento Counties. It is also a competitive LEC authorized to provide services

---

<sup>1</sup> All statutory references are to the California Public Utilities Code unless otherwise noted.

in the service territories of Pacific Bell, Verizon California Inc., and Frontier Communications (formerly known as Citizens Communications Company).

SureWest Long Distance (formerly known as Roseville Long Distance Company) is a nondominant interexchange carrier (IEC) authorized to provide long-distance telephone services.

SureWest TeleVideo is a competitive LEC and nondominant IEC authorized to provide video, voice, and data services in Sacramento County.

West Coast PCS LLC provides wireless telephone services in portions of California as authorized by the Federal Communications Commission.<sup>2</sup>

### **Background and Requested Authority**

In Decision (D.) 02-12-001, the Commission authorized SureWest-California to reincorporate in Delaware. The authority granted by D.02-12-001 was to expire unless exercised within one year of December 3, 2002, the date of the Decision. By letter dated November 7, 2003, the Commission's Executive Director authorized an extension until January 9, 2004, to exercise the authority granted by D.02-12-001.

SureWest-California did not exercise its authority to reincorporate in Delaware because of issues that came to light in December 2003. Specifically, SureWest discovered in December 2003 that an employee in the Corporate Finance Group had stolen \$2 million from SureWest in a series of illegal bank transactions. On February 5, 2004, the Federal Bureau of Investigation arrested the employee and his accomplices.<sup>3</sup> These events raised questions about the reliability of SureWest's financial statements that had to be resolved before the

---

<sup>2</sup> West Coast PCS LLC is a commercial mobile radio service provider. SureWest states that there will be no change to the wireless registration information now on file by West Coast PCS LLC as a result from the proposed reincorporation of SureWest-California.

<sup>3</sup> SureWest has sued to recover the missing funds from those responsible for the loss. SureWest is also seeking recovery of the missing funds through insurance coverage.

reincorporation could proceed. As a result, SureWest was unable to implement the reincorporation before the authority granted by D.02-12-001 expired.

On May 3, 2004, SureWest filed Application (A.) 04-05-006 for renewed authority under Section 854(a) to reincorporate SureWest-California in Delaware. Notice of the Application appeared in the Commission's Daily Calendar. There were no protests or other responses to the Application. SureWest filed a supplement to A.04-05-006 on July 9, 2004. The Application, as supplemented, asserts that the questions concerning SureWest's financial statements have been resolved and that the financial statements submitted with A.04-05-006 reflect the \$2 million in missing funds.<sup>4</sup>

The Application states that the reincorporation will be effected by merging SureWest-California into SureWest-Delaware. SureWest-Delaware will be the surviving entity. SureWest-Delaware will succeed to all assets owned by SureWest-California, including its ownership and control of the other co-applicants. Shareholders of SureWest-California at the time of the merger will become owners of equivalent shares in SureWest-Delaware.

SureWest represents that its motivation for the reincorporation is to have the holding company's corporate affairs governed by Delaware law rather than California law. SureWest contends that the certainty and predictability of Delaware law will enhance its ability to raise capital for growth and expansion.

SureWest maintains that the proposed reincorporation will have no effect on the assets, liabilities, business, or management of any company. Nor will it affect the state of incorporation of the SureWest public utility companies. SureWest also represents that the proposed reincorporation will not affect any rates or services offered by SureWest's public utility companies.

---

<sup>4</sup> Exhibit C of A.04-05-006 contains the SEC Form 10-K financial statements for SureWest-California for the fiscal year ending on December 31, 2003. These financial statements report the \$2 million in missing funds as a non-operating loss.

Finally, SureWest believes that approval of A.04-05-036 is exempt from the California Environmental Quality Act. This is because (1) the Application does not request authority for new construction, and (2) approval of the Application will not result in any changes to SureWest's operations or uses of existing assets.

## **Discussion**

The reincorporation requested in A.04-05-006 is subject to Section 854(a).<sup>5</sup> Section 854(a) states, in pertinent part, as follows:

No person or corporation...shall merge, acquire, or control...any public utility...doing business in this state without first securing authorization to do so from the commission...The commission may establish by order or rule the definitions of what constitute...acquisition, or control activities which are subject to this section...Any merger, acquisition, or control without that prior authorization shall be void and of no effect.

The Commission has broad discretion to determine if a transaction should be authorized pursuant to Section 854(a). The primary standard used by the Commission is whether the transaction will adversely affect the public interest. The Commission may also consider if the transaction will serve the public interest. Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.<sup>6</sup>

We conclude for the following reasons that it is reasonable to grant A.04-05-006 pursuant to Section 854(a). First, there is no opposition to the Application. Second, it does not appear that the public will be harmed by the transaction, as there will be no change to SureWest's operations, management, or utility rates and services.<sup>7</sup> Third, the public may benefit from the reincorporation

---

<sup>5</sup> D.02-12-001, *mimeo.*, p. 4.

<sup>6</sup> D.04-04-017, *mimeo.*, p. 3.

<sup>7</sup> Exhibit E of A.04-05-006 contains documents demonstrating that SureWest's public utility companies are current in their payment of fees and charges owed to the Commission.

to the extent it enhances SureWest's ability to raise capital and, in turn, to maintain, improve, and expand its services in California. Finally, California reaps enormous benefits from the services provided by public utilities. Thus, it is in the public interest to foster a business climate in California that is hospitable to utilities. Accordingly, ordinary transactions that are subject to Section 854(a), like the one before us here, should be approved absent a compelling reason to the contrary. No such reason has been alleged or shown in this proceeding.

### **California Environmental Quality Act (CEQA)**

Under CEQA and Rule 17.1 of the Commission's Rules of Practice and Procedure, we must consider the environmental consequences of projects that are subject to our discretionary approval.<sup>8</sup> Therefore, in deciding whether to grant A.04-05-006, we must consider if approval of the Application will alter an approved project, result in new projects, change facility operations, etc., in ways that have an environmental impact.

The record of this proceeding indicates that approval of A.04-05-006 will not have a significant effect on the environment. In particular, the Application does not request authority for new construction, and SureWest represents that approval of the Application will not result in any changes to SureWest's operations or uses of existing assets. Therefore, the proposed project qualifies for an exemption from CEQA pursuant to Section 15061(b)(3)(1) of the CEQA guidelines. Consequently, there is no need for further environmental review.

### **Category and Need for Hearing**

In Resolution ALJ-3134, dated May 7, 2004, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings would not be necessary. Based on the record of this proceeding, we affirm these preliminary determinations.

---

<sup>8</sup> Pub. Resources Code Section 21080.

**Pub. Util. Code § 311(g)**

This is an uncontested matter in which the decision grants the relief requested. Therefore, the otherwise applicable 30-day period for public review and comment is waived pursuant to Section 311(g)(2).

**Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Timothy Kenney is the assigned Administrative Law Judge in this proceeding.

**Findings of Fact**

1. A.04-05-006 requests authority under Section 854(a) to merge the holding company SureWest-California with and into SureWest-Delaware in order to implement a reincorporation of the holding company from a California corporation to a Delaware corporation.
2. Under the proposed reincorporation, SureWest-Delaware will succeed to all assets owned by SureWest-California, including ownership and control of four California utilities. The four utilities are SureWest Telephone, SureWest Long Distance, SureWest TeleVideo, and West Coast PCS LLC.
3. There will be no change in the operations, management, rates, or services of the four utilities as a result of the reincorporation.
4. There is no evidence in this proceeding that the reincorporation will adversely affect the customers of the four utilities or the public at large.
5. The four utilities are current on all applicable regulatory fees and charges owed to the Commission.
6. There is no opposition to A.04-05-006.
7. The public may benefit from the reincorporation to the extent the transaction enhances SureWest's ability to raise capital and, in turn, to maintain, improve, and expand public utility services in California.
8. Public utilities provide significant benefits to California.
9. A.04-05-006 does not request authority for new construction

10. SureWest represents that approval of A.04-05-006 will not result in any changes to SureWest's operations or uses of existing assets.

11. There is nothing in the record of this proceeding which indicates that approval of A.04-05-006 will alter an approved project, result in new projects, change facility operations, etc., in ways that have an environmental impact.

12. For the reasons set forth in the three previous Findings of Fact (FOFs), approval of A.04-05-006 will not have an adverse impact on the environment.

### **Conclusions of Law**

1. This is a ratesetting proceeding.

2. No hearing is necessary.

3. Section 854(a) requires Commission authorization to transfer control of a public utility. Any transfer of control without Commission authorization is void under the statute.

4. The reincorporation requested in A.04-05-006 is subject to Section 854(a).

5. It is in the public interest for the Commission to foster a business climate that is hospitable to public utilities.

6. For the reasons stated in FOF 8 and the previous Conclusion of Law (COL), it is in the public interest to approve ordinary business transactions that are subject to Section 854(a), like that proposed in A.04-05-006, absent a compelling reason to the contrary. No such reason has been alleged or shown in this proceeding.

7. A.04-05-006 should be granted pursuant to Section 854(a) for the reasons set forth in the body of this decision, FOFs 3 through 8, and the previous COL.

8. For the reasons stated in FOF 12, the corporate reorganization described in A.04-05-006 is exempt from CEQA pursuant to CEQA Guidelines Section 1506(b)(3)(1) and, therefore, additional environmental review is not required.

9. Because A.04-05-006 is noncontroversial and uncontested, the following Order should be effective on the date it is signed.

**O R D E R**

**IT IS ORDERED** that:

1. Application 04-05-006 is granted pursuant to Pub. Util. Code § 854(a).
2. The authority granted by this Order shall expire unless exercised within one year of the date of this Order.
3. The Applicants shall notify the Director of the Telecommunications Division, in writing, of the date that the transaction authorized by this Order takes place. Such notice shall be provided within 30 days of the transaction. A copy of the document(s) effectuating the transaction shall be attached.
4. This proceeding is closed.

This order is effective today.

Dated August 19, 2004, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners

I dissent.

/s/ LORETTA M. LYNCH  
Commissioner

I will file a dissent.

/s/ CARL W. WOOD  
Commissioner



***Dissenting opinion of Commissioner Carl Wood***  
**to D.04-08-018 #17– SureWest Communications**

This item proposes to approve a transfer of control SureWest Communications, the owner of the former Roseville Telephone and self-proclaimed sixth largest RLEC (rural local exchange carrier) in the U.S. The transfer is from a corporation organized and operating pursuant to the Corporations Code of California to one organized and operating under Delaware law. I believe that approving this transfer is bad policy, and that there are no arguments that justify it.

The transfer of control must be approved by this Commission pursuant to Pub. Util. Code § 854(a). Section 854 (a) states, in part:

No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.

In other words, once we have approved this transfer of control to a holding company that is no longer “organized” under the laws of this state, we may lose some of our ability to affect any subsequent transfers of control, or any other matter relating to corporate governance of SureWest. Without a clear, off-setting public benefit, I think that this would be foolish and unwise.

The SureWest corporate mission is intensely focused on the Sacramento region. As a local leader in installing triple play facilities it is intent on becoming an essential part of the communications infrastructure of this fast growing region in California. But based on its recent financial performance, it is undergoing something of a struggle: its traditional telecom business is the cash cow supporting its fast growing but expensive wireless and broadband businesses, but in the telecom segment both revenues and subscriber lines dipped in 2003. If the holding company leaves the state, California loses some of its ability to influence

decisions about the continued investment of resources to support its services to this important area of our state. A local provider and its holding company should be governed by local law and regulation, including dividend and investment law, policy and practice.

What are the arguments in favor of this foolish and unwise approval? The most strident one is simply a denigration of California – we should do this because some utility managers want it and not to do it would be somehow “anti-business.”

The California inferiority complex promoted by some politicians and foreign businesses ought to be cured right here. Californians have nothing to be ashamed of in our laws relating to corporate governance, finance and control, which have produced the world’s sixth largest economy. The businesses that are privileged to provide our local infrastructure should be subject to the local laws, and investment and operation should not be influenced by the potential for corporate chicanery. SureWest has prospered under California law and should be permitted to continue to do so.

A second argument is that this approval may facilitate raising capital. There is no evidence that this is the case. But the converse question should also be asked: will a change from California to Delaware law enable the dissipation of capital ? We don’t know. Will it insulate management from accountability to equity investors (who are in this case largely local) for bad investment and financial actions, due to different notions of fiduciary duty and obligations of corporate officers and agents ? We don’t know. We have not done our due diligence on this issue.

A.04-05-006

D.04-08-018

What all of this amounts to is a misapplication of the public interest standard that inheres in Pub. Util. Code § 854(a). We are asked to make a foolish and unwise decision, with the ultimate justification being based on our own lack of due diligence and a shrilly asserted bias against California's traditional approaches to corporate governance. There is not a shred of evidence that the public receives any benefit from this transfer of control. We cannot even say that there is no harm to the public. This is not application of the public interest, as required by the law. It is an abdication.

/s/ CARL WOOD

Carl Wood  
Commissioner

San Francisco, California  
August 19, 2004